

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL TODD LONG,

Defendant and Appellant.

C046360

(Super. Ct. No.
03F01295)

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, Judge. Affirmed.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Wanda Hill Rouzan, Supervising Deputy Attorney General, for Plaintiff and Respondent.

* Under California Rules of Court, rules 976(b) and 976.1, only the Introduction, the Factual and Procedural Background, part II of the Discussion, and the Disposition are certified for publication.

INTRODUCTION

A jury found defendant Michael Todd Long guilty of inflicting corporal injury on a cohabitant and of committing battery with serious bodily injury on her.

Defendant contends that after he refused to accept the prosecution's original plea offer, the People acted vindictively by amending the complaint to add new charges and increasing the sentence offered. Defendant further asserts both that the court erred and that his counsel rendered ineffective assistance because the court did not instruct the jury that evidence of the character of a witness may be considered in determining witness credibility. Lastly, defendant contends the court erred in refusing to instruct the jury on the People's delay in disclosing evidence. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2002, Amy Clark drove herself to a hospital emergency room.¹ Clark told emergency room physician Donald Snyder that defendant hit her in the face. At the time, Clark and defendant were living together as girlfriend and boyfriend. Doctor Snyder noticed bruising around Clark's left eye. An X-ray showed Clark had a fracture to the bone around that eye. Doctor Snyder diagnosed Clark as a victim of assault.

¹ Amy Clark married defendant on March 13, 2003, and became Amy Long. She is referred to in the transcripts as Amy Clark, Amy Long, and Amy Clark Long. For clarity, we will refer to her as Clark.

Marysville Police Officer Matt Minton was dispatched to the hospital to speak with Clark. Clark told Officer Minton that defendant grabbed her hair and punched her in the face during an argument earlier that day.² Officer Minton testified that Clark's eye appeared bruised and nearly swollen shut.

The original complaint charged defendant with one count of inflicting corporal injury on Clark.

In August 2003, the deputy district attorney extended defendant a settlement offer of five years' probation and 120 days in a batterer's treatment program in exchange for a guilty plea. Defendant refused the offer. The court set the case for a preliminary examination. The original prosecutor then transferred the case to a new prosecutor for trial preparation.

In September 2003, defendant tried to accept the August settlement offer. The new prosecutor told defendant that offer was no longer available. The prosecutor filed an amended complaint, which added an infliction of great bodily injury enhancement to the charge of inflicting corporal injury on a cohabitant and an additional charge of battery resulting in serious bodily injury. The amended complaint further alleged a prior strike conviction. The prosecutor then extended defendant a new settlement offer of 10 years in prison in exchange for his guilty plea. Defendant did not accept this offer.

² The audiotape of this conversation will be discussed as part of defendant's last argument.

At trial, Clark acknowledged that she told Doctor Snyder and Officer Minton that defendant hit her in the face. However, Clark testified that she lied at the hospital and that defendant never hit her that day. Clark said that on December 17, 2002, she argued with defendant because she thought he was sleeping with his ex-wife. Clark testified that she rammed defendant's car with her car and hit her face on the steering wheel in the process. Doctor Snyder, however, testified that Clark's injuries were inconsistent with her striking her face on a steering wheel.

Dr. Baljit Atwal -- a psychologist who testified for the defense -- diagnosed Clark as having a borderline personality disorder. The doctor said that a person with this disorder is capable of fabricating information during stressful times. Particular to Clark, the doctor testified that in situations where she thinks she is going to be abandoned or the relationship is ending, she is more likely to have impaired capacity to perceive the facts. Dr. Atwal believed Clark most likely exhibited symptoms of her disorder on December 17 because the conditions were such for her to be emotionally distressed.

At the close of testimony, the court discussed CALJIC No. 2.20 with counsel. CALJIC No. 2.20 provides a nonexclusive list of factors the jury may consider in determining the believability of a witness. The prosecutor asked the court to omit an optional sentence in the instruction, which provides that the jury may consider the character of the witness for honesty and truthfulness or their opposites in determining the

witness's believability. Defendant argued that evidence of Clark's character was brought in through Dr. Atwal's testimony and that Clark's lack of credibility was important to the defense. The court struck the sentence from the instruction on the basis that this part of the instruction was not intended for the type of testimony the doctor gave. On defendant's request for reconsideration, the court confirmed the ruling.

The jury convicted defendant on both counts. Following the verdict, the court found defendant's prior strike conviction to be true.

The court then heard defendant's motion to strike his prior conviction. As part of the motion, defendant argued the proposed 15-year sentence was cruel and unusual. He claimed the initial plea offer of probation and 120 days in a batterer's treatment program showed the prosecution's position on what this case was worth in terms of sentencing. Defendant contended that the prosecution raised its settlement offer to 10 years because defendant asserted his right to have a preliminary examination. Defendant argued that the prosecutor had all the information about the crime and defendant's history before the first settlement offer. Thus, he argued, the prosecutor acted vindictively when she added more charges and increased the prison term offer.

The prosecutor acknowledged there had been no change in the case information between the first and second settlement offers except for her appointment as the new prosecutor when the case was set for preliminary examination. She argued, however, that

the first offer should not have been made. When she reviewed the extent of Clark's injuries and defendant's criminal history, she filed the additional charges and changed the settlement offer.

The court denied defendant's motion to strike the prior conviction. The court agreed the initial probation offer was not appropriate and rejected defendant's argument that the amended complaint was punishment for exercising his right to a hearing.

The court sentenced defendant to the middle term of three years in state prison on the conviction for inflicting corporal injury on a cohabitant, doubled for his prior strike. The court also imposed a four-year consecutive term for the great bodily injury enhancement on that conviction and an additional five-year consecutive term for his prior conviction. The court imposed a middle term of three years, doubled to six, on the battery conviction and stayed that term, for a total term of 15 years.

DISCUSSION

I

Defendant Has Failed To Show Prosecutorial Vindictiveness

Defendant contends that after he rejected the initial settlement offer, the prosecutor vindictively amended the complaint to add new charges and increased the minimum time to be served -- from 120 days in a batterer's treatment program to 10 years -- in a new plea bargain offer. We reject defendant's contention.

A defendant may not be penalized for asserting his constitutional rights. (*United States v. Jackson* (1968) 390 U.S. 570, 582 [20 L.Ed.2d 138, 147].) "The due process clause of the California Constitution also prohibits increased charges motivated by prosecutorial vindictiveness." (*In re Bower* (1985) 38 Cal.3d 865, 876.)

A presumption of prosecutorial vindictiveness arises when a prosecutor increases the charges against a defendant after the defendant has obtained a mistrial or dismissal and the circumstances show "a 'reasonable likelihood of vindictiveness.'" (*In re Bower, supra*, 38 Cal.3d at p. 879.) A showing that a change in objective circumstances justified the increased charges may rebut the presumption. (*Ibid.*)

California has not extended this presumption to the pretrial phase. (See *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1547-1548.) In *People v. Farrow* (1982) 133 Cal.App.3d 147, the court held the presumption of prosecutorial vindictiveness could not be extended beyond its postconviction context. (*Id.* at p. 152.) "Such a presumption would be unworkable in the pretrial context; since [Penal Code] section 1009 allows the prosecution to amend the charges against a defendant at any time to include offenses shown by evidence at the preliminary hearing, and since a defendant can assert innumerable pretrial rights, a defendant could assert that retaliation was the motive for any amendment in the charges." (*People v. Johnson* (1991) 233 Cal.App.3d 425, 447.) Moreover, in preparing a case for trial, the prosecutor "simply may come

to realize that the information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized." (*United States v. Goodwin* (1982) 457 U.S. 368, 381 [73 L.Ed.2d 74, 85].)

Defendant argues the presumption should apply here, despite the pretrial timing, because the People did not give defendant warning they would change the offer if he did not accept it. We disagree.

The law does not support defendant's argument. (See *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [54 L.Ed.2d 604, 610-611]; *People v. Rivera* (1981) 127 Cal.App.3d 136, 147-148 [refusing to apply the presumption when prosecution filed additional charges after a plea was refused].) Defendant claims these cases are distinguishable because they involved warnings that the prosecution would add more charges if the defendant refused the plea. We decline to attribute any significance to this distinction. "It is not the inherent give-and-take of plea bargaining that validates upward charging determinations in the pretrial context; rather, it is the societal interest in not foreclosing the prosecutor from modifying the course of the prosecution when he or she uncovers additional information that suggests a further basis for prosecution or when he or she comes to realize that the information the state already possesses has a broader significance than at first believed." (*People v. Johnson, supra*, 233 Cal.App.3d at p. 449.) Thus, the presence or absence of warnings during the plea bargain process is

immaterial. The presumption of prosecutorial vindictiveness does not apply to this case.

Absent the presumption, the burden is on defendant to show actual vindictiveness. (*People v. Bracey, supra*, 21 Cal.App.4th at p. 1549.) Defendant must provide objective evidence "that the prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do." (*United States v. Goodwin, supra*, 457 U.S. at p. 384 [73 L.Ed.2d at p. 87].) Defendant has not met this burden.

As evidence of vindictiveness, defendant argues that the only change between the initial plea offer and the subsequent offer was the exercise of his right to a preliminary hearing on the charges. Not only does this fail as objective evidence, defendant is incorrect.

It is true that the information known to the People did not change between the two plea offers; however, defendant overlooks the change in the prosecutor. By the time defendant decided to accept the month-old plea offer, the case had been given to a new prosecutor for trial preparation. After examining the evidence for the first time, the new prosecutor felt the original probation offer was inappropriate and should not have been tendered. The trial court agreed. The People correctly believed they had no obligation to hold the original plea open to defendant for any period of time. This is a classic situation where the state's assessment of the proper extent of

prosecution may not have fully crystallized. (See *People v. Lucious* (1984) 153 Cal.App.3d 416, 422.)³

II

The Jury Was Properly Instructed on Witness Credibility

A

The Court Did Not Err in Refusing to Give the Character Instruction for Witness Credibility

Defendant claims prejudicial error because the trial court refused to include within CALJIC No. 2.20 an instruction that the jury could consider "[t]he character of the witness for honesty or truthfulness or their opposites" in judging the believability of a witness.⁴ Defendant claimed that Dr. Atwal's

³ Even if the presumption of prosecutorial vindictiveness did apply, we find the People's showing of an objective change in circumstances -- a proper assessment of the case by a new prosecutor -- successfully rebuts the presumption. Mistakes are valid reasons for a pretrial change in pending charges. (See *People v. Bracey, supra*, 21 Cal.App.4th at p. 1550.)

⁴ CALJIC No. 2.20 provides: "Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of

testimony about Clark's mental disorder was evidence of her character for untruthfulness. The court struck the sentence stating that the proffered evidence "is not the type of evidence that this instruction is intended for." We agree.

Character evidence is "[e]vidence regarding someone's general personality traits; evidence of a person's moral standing in a community based on reputation or opinion." (Black's Law Dict. (7th ed. 1999) p. 576, col. 2.) An expert's opinion regarding a mental disorder, on the other hand, is admitted only to inform the jury of the effect a certain medical condition may have on the witness. (*People v. Russel* (1968) 69 Cal.2d 187, 196.) The expert is not allowed to give an opinion on whether a witness is telling the truth because the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact. (*People v. Cole* (1956) 47 Cal.2d 99, 103; Evid. Code, § 801, subd. (a).)

Here, most of Dr. Atwal's testimony abstractly described the symptoms a person with borderline personality disorder might suffer under certain circumstances. Those symptoms included

the witness toward this action or toward the giving of testimony[.] [;] [¶] [A statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony][.] [;] [¶] [*The character of the witness for honesty or truthfulness or their opposites*][;] [¶] [An admission by the witness of untruthfulness][;] [¶] [*The witness' prior conviction of a felony*][;] [¶] [*Past criminal conduct of a witness amounting to a misdemeanor*][;] [¶] [*Whether the witness is testifying under a grant of immunity*]."

The court omitted the italicized paragraphs.

being capable of fabricating information during stressful times. This testimony is merely explanatory and aided the jury in understanding the disorder. (*People v. Russel, supra*, 69 Cal.2d at p. 196.) Moreover, being *capable* of fabricating information is not exclusive to persons with this disorder. This was not evidence of Clark's character.

Dr. Atwal also testified that Clark is likely to have an impaired or faulty capacity to perceive the facts in a situation when she perceives she is going to be abandoned or the relationship is ending. Additionally, it was the doctor's opinion that in the past Clark had experienced a distorted sense of reality such that she may have thought she was telling the truth but was not. The doctor could not say if Clark was exhibiting these symptoms at the hospital; however, he opined that the conditions were correct for her to be emotionally distressed.

This testimony speaks to Clark's capacity and her perception of reality, not her character for untruthfulness. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83 [cautioning that evidence of battered woman syndrome could be considered only for the limited purpose of showing defendant's mental state].) The jury was properly instructed on that issue when the court advised them they should consider the witness's ability to see or hear or otherwise become aware of the matter about which the witness testified.

In sum, Dr. Atwal provided no testimony of Clark's character for untruthfulness. Accordingly, there was no error

in omitting the instruction. The omission of an inappropriate instruction does not violate a defendant's rights to due process and to present a defense. (*People v. Brown* (2003) 31 Cal.4th 518, 563-564.)

B

Trial Counsel Was Not Ineffective

Defendant further claims his trial counsel was ineffective in failing to request CALJIC No. 2.24 based on Dr. Atwal's testimony. This claim fails.

To prevail on a claim of ineffective assistance of counsel, defendant must establish his attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

CALJIC No. 2.24 provides: "Evidence of the character of a witness for honesty or truthfulness may be considered in determining [his] [her] believability." This instruction is nearly identical to the sentence in CALJIC No. 2.20 the trial court omitted as inappropriate. Trial counsel was not incompetent for failing to request an inappropriate instruction. (*People v. Ervin* (2000) 22 Cal.4th 48, 89-91.)⁵

⁵ Further, the record is clear that counsel vigorously argued for the inclusion of this sentence in CALJIC No. 2.20. The court rejected the argument twice. Counsel is not required to engage in futile arguments before the court. (*People v. Osband* (1996) 13 Cal.4th 622, 678.)

III

The Court Did Not Err in Failing to Instruct the Jury on the People's Delay in Disclosing Evidence

Lastly, defendant claims the trial court erred in refusing to instruct the jury with CALJIC No. 2.28 on the People's delay in providing the audiotape of Clark's hospital conversation with Officer Minton. We reject this claim.

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) "Absent a showing of abuse of discretion in ruling on a discovery motion and prejudice resulting from an adverse ruling, this court will not interfere with the trial court's action. [Citation.]" (*Crumpton v. Dickstein* (1978) 82 Cal.App.3d 166, 169.)

Giving CALJIC No. 2.28 is one of many sanctions a court may impose for failure to provide discovery. (Pen. Code, § 1054.5, subd. (b).) CALJIC No. 2.28 instructs the jury on the consequences of the People's failure to provide discovery.⁶

⁶ CALJIC No. 2.28 provides: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D] [d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the [People] [Defendant[s]] _____ [concealed] [and] [or] [failed

“‘[A] trial court may, in the exercise of its discretion, “consider a wide range of sanctions” in response to the prosecution’s violation of a discovery order.’” (*People v. Ayala, supra*, 23 Cal.4th at p. 299.) Where there is little prejudice to the defendant resulting from the violation, a severe sanction is inappropriate. (See *People v. Caldwell* (1991) 230 Cal.App.3d Supp. 1, 7 [reversing an order dismissing a complaint for discovery violation in the absence of a showing of prejudice, but stating less severe sanctions may be in order].) Further, because CALJIC No. 2.28 suggests that a discovery violation is to be considered “against” the offending party, it may unfairly prejudice a party for excusable error. (*People v. Saucedo* (2004) 121 Cal.App.4th 937, 943.)

Here, the court found the People made a reasonable, good faith effort to provide the audiotape. The court further found the prejudice of the instruction to the People outweighed the

to timely disclose] the following evidence: [¶] Although the [People’s] [Defendant’s] _____ [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any [concealment] [and] [or] [delayed disclosure] are matters for your consideration. However, you should consider whether the [concealed] [and] [or] [untimely disclosed evidence] pertains to a fact of importance, something trivial or subject matters already established by other credible evidence. [¶] [A defendant’s failure to timely disclose the evidence [he] [she] intends to produce at trial may not be considered against any other defendant[s] [unless you find that the other defendant[s] authorized the failure to timely disclose].]”

prejudice of the delay to defendant. The record supports the court's finding.

Before trial, Officer Minton provided the People with a copy of an audiotape of what he thought was his conversation with Clark at the hospital. The People's disclosure of this tape to defendant was timely. Defendant discovered that the tape did not contain the conversation and requested the correct tape from the People. The police department told the People there was no other tape on file for this case.

In preparation for his testimony, Officer Minton realized the police department copied the wrong side of the audiotape for the prosecution. On the second day of trial, the correct side of the tape was given to the prosecutor who, in turn, provided it to defendant within an hour after receiving it. Defendant had only a weekend to review the tape before Officer Minton testified. Because of this delay, defendant asked the court to give CALJIC No. 2.28. The court refused to give the instruction.

Defendant's counsel admitted the only prejudice in the delay was that her weekend spent reviewing the tape could have been used in preparing for other witnesses to be questioned. In fact, counsel agreed she was able to use the transcripts of the audiotape, provided by the prosecutor, to successfully impeach the officer on several points. On the other hand, the prosecutor did not use the audiotape in her direct examination of Officer Minton.

Under these circumstances, the trial court did not abuse its discretion in refusing to instruct the jury with CALJIC No. 2.28.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

DAVIS, Acting P.J.

HULL, J.